

How to bail out your local club: the application of the State aid rules to professional football clubs in financial difficulty

Oskar van Maren¹

Published online: 21 March 2017

© The Author(s) 2017. This article is an open access publication

Abstract This article analyzes the decisions involving State aid granted to professional football clubs in financial difficulty, namely Willem II, MVV Maastricht, NEC Nijmegen, FC Den Bosch and Valencia CF. The decisions are fundamentally different in one very important aspect: the aid granted to the Dutch clubs was declared compatible aid, whereas the aid granted to Valencia CF was declared incompatible and needs to be recovered. This article will explain why there were divergences in the decisions and will describe the broader lessons that are to be learned, particularly in order to avoid future recovery decisions.

Keywords State aid · EU competition law · Rescuing and Restructuring Guidelines for undertakings in financial difficulty · Valencia CF

1 Introduction

Professional football as a global business continues to grow at a steady pace. To give but a few examples, more than 1.013 billion people worldwide watched the World Cup final between Germany and Argentina in 2014, 100

million more than the final of 2010,¹ while FIFA's television broadcasting rights revenue worldwide for that year was over €650 million.² The record fee paid for an individual transfer has once again been broken in 2016,³ and with more money generated than ever from the selling of TV-rights,⁴ and the emergence of China as an economic power on the football scene,⁵ it is likely that transfer fees as well as player wages will go up in the years to come.

Notwithstanding the constant commercialization of professional football, there were also large concerns regarding the increasing indebtedness of football clubs.⁶ Some historically successful clubs like Glasgow Rangers and FC Parma were declared bankrupt in 2012 and 2015, respectively, forcing them to change their corporate identity and re-enter professional football at the lowest level of competition. As is shown in UEFA's yearly benchmarking reports, the deficit of clubs with a UEFA License increased

¹ 2014 FIFA World Cup Brazil – Television Audience Report, page 7.

² Statista, Television broadcasting rights revenue of the FIFA worldwide by region from 2009 to 2015. <https://www.statista.com/statistics/268839/fifa-broadcasting-rights-revenue-worldwide-by-region/>. Accessed 5 January 2017.

³ French player Paul Pogba was transferred for a record fee of €105 million from Juventus to Manchester United in August 2016.

⁴ The English Premier League in particular stands out, having sold its domestic TV-rights for roughly €6 billion for three seasons from 2016 to 2017.

⁵ In recent weeks alone, Argentinian player Carlos Tévez signed a deal with Chinese club Shanghai Shenhua that will earn him close to €40 million a year, while Brazilian player Oscar will receive €25 million a year from his new club Shanghai SIPG.

⁶ UEFA Club Licensing Benchmarking Report Financial Year ending 2011, page 3. See also Serby (2016), page 43.

✉ Oskar van Maren
o.van.maren@asser.nl

¹ Researcher International and European Sports Law, T.M.C. Asser Institute, The Hague, The Netherlands

from €0.6 billion in 2007 to a peak of €1.7 billion in 2011.⁷ The increasing indebtedness was not only related to the global economic crisis,⁸ but also caused by irresponsible spending by the clubs.⁹

With the objective of, *inter alia*, protecting the long-term viability and sustainability of European club football, UEFA introduced a break-even requirement for the clubs that have qualified for a UEFA club competition from the 2013–2014 season onwards. According to this requirement, clubs must demonstrate that their expenditure does not exceed their revenue should they wish to avoid sanctions by UEFA Club Financial Control Body.¹⁰ In a joint statement with UEFA from March 2012, the European Commission also recognized the increasing indebtedness of football clubs and pointed out that “there is a significant risk that football clubs will increasingly apply for financial help to the (...) public authorities in order to be able to continue playing professional football”.¹¹

The joint-statement led Craven to believe that State aid enforcement in professional football became a Commission priority and that many investigations would be launched.¹² By the end of 2013, this indeed appeared to be the case, with the Commission opening formal investigations regarding alleged State aid granted to seven Spanish professional football clubs¹³ and five Dutch professional football clubs.¹⁴ Furthermore, as became apparent from the opening decisions, all five Dutch clubs as well as the Spanish clubs Valencia CF, Elche CF and Hércules CF were in financial difficulty at

the time the State aid was granted.¹⁵ The Commission’s final decisions, announced on 4 July 2016¹⁶ and published a few months afterward, will form the empirical backbone of this article.

In recent years, UEFA released better overall results regarding the indebtedness of professional football clubs.¹⁷ Yet, there are still many clubs across Europe that are struggling financially. As a consequence, future State aid measures by (local) public authorities to professional football clubs in financial difficulty can be expected. For instance, on 16 February 2017, the Enschede city Council agreed to guarantee a loan of €8.4 million granted to the Dutch club FC Twente, which aims to, *inter alia*, preserve an earlier loan granted by the municipality to the club of €17 million.¹⁸ Even though FC Twente has still not received this loan at the time of writing, the commercial and technical director of the club has stated that the guarantee is “crucial for the survival of FC Twente”.¹⁹ Keeping in mind that a Commission investigation into this guarantee is now a realistic possibility, it is important for both public authorities and clubs to understand under what criteria State aid to clubs in financial difficulty is permitted.

This article will therefore closely analyze the decisions involving State aid granted to professional football clubs in financial difficulty.²⁰ These are the Dutch clubs Willem

⁷ UEFA Club Licensing Benchmarking Report Financial Year ending 2011, page 13.

⁸ Van Maren (2015), pages 86–87. As will also be explained in Sect. 2.2, the case of Valencia CF is a particularly good example of how the global economic and housing crisis affected professional football.

⁹ UEFA Club Licensing Benchmarking Report Financial Year ending 2009, page 9. See also Craven (2014a), page 584.

¹⁰ UEFA Club Licensing and Financial Fair Play Regulations, Edition 2012, Articles 58–63. Article 61 allows for an acceptable deviation of €5 million, i.e. the maximum aggregate break-even deficit possible for a club to be deemed in compliance with the break-even requirement.

¹¹ Joint Statement of 21 March 2012 by Vice-President Joaquín Almunia and President Michel Platini, point 12.

¹² Craven (2014b), page 206.

¹³ Commission Press Release of 18 December 2013, IP/13/1287 State aid: Commission opens in-depth investigation into public funding of certain Spanish professional football clubs.

¹⁴ Commission Press Release of 6 March 2013, IP/13/192, State aid: Commission opens in-depth investigation into public funding of five Dutch professional football clubs.

¹⁵ Commission Decision SA.36387 of 18 December 2013 – Spain: Alleged aid in favour of three Valencia football clubs; and Commission Decision SA.33584 of 6 March 2013 – The Netherlands: Alleged municipal aid to the Professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008–2011.

¹⁶ Commission Press Release of 4 July 2016, IP/16/2401 State aid: Commission decides Spanish professional football clubs have to pay back incompatible aid; and Commission Press Release of 4 July 2016, IP/16/2402 State aid: Commission clears support measures for certain football clubs in the Netherlands.

¹⁷ Benchmarking report on the clubs qualified and licensed to compete in the UEFA competition season 2013/14, page 7.

¹⁸ Garantstelling gemeente t.b.v. geldlening(en) aan FC Twente Stadion BV, version of 12 January 2016. <http://www.raad053.nl/stukken/8755/1/>. Accessed 21 February 2017. For more information on the financial situation of FC Twente, see, for example, O. van Maren, The Rise and Fall of FC Twente. Asser International Sports Law Blog, 19 May 2016. <http://www.asser.nl/SportsLaw/Blog/post/the-rise-and-fall-of-fc-twente>. Accessed 5 January 2017.

¹⁹ Mijn 2017: Van Halst en de wederopbouw van FC Twente. NOS, 5 January 2017. <http://nos.nl/artikel/2151528-mijn-2017-van-halst-en-de-wederopbouw-van-fc-twente.html>. Accessed 5 January 2017.

²⁰ Please note that to this day Valencia CF continues to maintain that it was not in financial difficulty at the moment it received the State aid.

II,²¹ MVV Maastricht,²² NEC Nijmegen²³ and FC Den Bosch,²⁴ and the Spanish clubs Valencia CF, Hércules CF and Elche CF.²⁵ The decisions are fundamentally different in one very important aspect: the aid granted to the Dutch clubs was declared compatible under Article 107(3)(c) TFEU, whereas the aid granted to the three Spanish clubs was declared incompatible and needs to be recovered. Why were there divergences in the Commission's decisions? As will be argued in this article, the devil is very much in the details. In order to really grasp what these details are, this article will only focus on one Spanish club: Valencia CF. Such a focus allows for a clearer description of the facts involving this (past) Spanish football giant, as well as a more thorough scrutiny of the Commission's assessment. The last part of this article will highlight the broader lessons that are to be learned by football clubs and how future recovery decisions can be avoided.

The article is structured as follows: Section 2 will provide background information on all the clubs and the respective State aid measures, while Sect. 3 will also analyze why the Commission concluded that each measure is to be considered State aid under Article 107(1) TFEU. This will be followed by an overview on the compatibility assessment, and in particular the so-called Rescue and Restructuring Guidelines, used for undertakings in financial difficulty.

Subsequently, in Sect. 5, the compatibility assessment conducted by the Commission in its decisions will be analyzed. At this point, it is important to highlight that the Rescue and Restructuring Guidelines, used for the compatibility assessment, are regularly updated, the latest version being published in 2014.²⁶ However, because the aid measures analyzed and discussed in this article were granted in 2009 and 2010, the measures are scrutinized

under the older 2004 Rescue and Restructuring Guidelines.²⁷

Finally in Sect. 6, the conditions set out by the Commission on the basis of the decisions will be discussed. In this regard, it is worth referring to point 13 of the 2012 Joint Statement, which held that when assessing the compatibility of aid to undertakings facing financial difficulties “one of the key factors that the Commission takes into account is whether and how the undertaking in question implements compensatory measures in the interest of fair competition. Given the specificity of the sports sector, it is not always straightforward to envisage such type of potential compensatory measures for football clubs.”²⁸ This section will therefore determine whether the applied conditions and criteria fit the professional football sector, and will briefly discuss the changes made in the 2014 Rescue and Restructuring Guidelines. This in turn allows us to determine whether the decisions can serve as a blueprint for public authorities within the EU willing to grant State aid to football clubs in financial difficulty in the future.

2 Background of the investigated State aid measures

This section briefly maps all the aid measures conferred by the Dutch and Spanish public authorities, respectively. It explains why the Commission had doubts regarding the legality of the measures under EU State aid rules and why it launched the formal investigation procedures.

2.1 The measures in favour of the four Dutch professional football clubs

2.1.1 *Willem II*

In 2004, the municipality of Tilburg and football club Willem II concluded a contract, by which Tilburg became the owner of Willem II's stadium and the club obtained a lease for the use of the stadium.²⁹ The annual rent of the stadium was established at €1 million, based on a depreciation period of 30 years, investment costs and an interest rate of 5.5%.³⁰

²¹ Commission Decision SA.40168 of 4 July 2016 on State Aid implemented by the Netherlands in favour of the professional football club Willem II in Tilburg.

²² Commission Decision SA.41612 of 4 July 2016 on State Aid implemented by the Netherlands in favour of the professional football club MVV in Maastricht.

²³ Commission Decision SA.41617 of 4 July 2016 on State Aid implemented by the Netherlands in favour of the professional football club NEC in Nijmegen.

²⁴ Commission Decision SA.41614 of 4 July 2016 on State Aid implemented by the Netherlands in favour of the professional football club FC Den Bosch in 's-Hertogenbosch.

²⁵ Commission Decision SA.36387 of 4 July 2016 on the State Aid for Valencia Club de Fútbol Sociedad Anónima Deportiva, Hércules Club de Fútbol Sociedad Anónima Deportiva and Elche Club de Fútbol Sociedad Anónima Deportiva.

²⁶ Communication from the Commission of 31 July 2014 (2014/C 249/01) Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty.

²⁷ Communication from the Commission of 1 October 2004 (2004/C 244/02) Community Guidelines on State Aid for Rescuing and Restructuring firms in difficulty.

²⁸ Joint Statement of 21 March 2012 by Vice-President Joaquín Almunia and President Michel Platini, point 13.

²⁹ Commission Decision on State Aid SA.40168 of 4 July 2016 implemented by the Netherlands in favour of the professional football club Willem II in Tilburg, para. 10.

³⁰ Commission Decision SA.33584 of 6 March 2013 – The Netherlands Alleged municipal aid to the Professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008–2011, para. 29.

In May 2010, Willem II found itself on the verge of bankruptcy. The municipality was quick to realize the potential negative effects a bankruptcy could have for Tilburg. These negative effects consisted of (1) the loss of rental income; (2) the absence of a tenant for the stadium; (3) the absence of professional football in Tilburg; and (4) the necessity to demolish the stadium and all the costs it would entail.³¹ As a result, on 31 May 2010 the municipality decided to lower the rent to €905,000 per year and to decrease the variable costs. Both measures were taken with retroactive effect till 1 July 2004, which resulted in Willem II receiving a total of €2.4 million from the municipality.³²

Tilburg's rescue operation of Willem II was never notified to the Commission.³³ Instead, a citizen informed DG Competition shortly after the measure was implemented by means of a letter. This prompted the Commission to send a request for information to the Netherlands on 14 March 2011.³⁴

In response to the Commission, the Dutch authorities argued that the new rent agreement was in conformity with the current municipal calculation methods and that the basic principles of the 2004 agreement were still respected. Moreover, the costs Tilburg would suffer for letting Willem II go bankrupt would be higher than the rescue costs. Consequently, the municipality believed it acted in accordance with the so-called 'Market Economy Investor Principle' (MEIP).³⁵ Besides, the municipality imposed a restructuring plan that aimed at restoring the club's long-term viability. The conditions of this plan included finding a way to clean up its balance sheet and the need to respect the national football association's regulations on wages of players.³⁶ As will be shown later on in the article, and specifically in Sect. 5.1, successfully imposing a restructuring plan aimed at restoring long-term viability proved fundamental in order to get the aid measure to be 'allowed' by the Commission.

In its decision to open a formal investigation, the Commission counter argued that the depreciation of the stadium's rent was already adjusted in 2007, and would not justify the retroactive application until 2004. Additionally, the lowering of the variable costs with retroactive effects ended up lower than the actual maintenance costs for that

period, and should therefore be considered as State aid in accordance with Article 107(1) TFEU.³⁷ Finally, at the time the Commission launched the formal investigation, it nourished doubts whether the aid measure could be considered compatible with the internal market pursuant Article 107(3)(c). Having received no notification of the rescue measure, the Commission was unable to carry out a proper compatibility assessment.

2.1.2 MVV

In 2010, football club MVV was facing severe financial difficulties: its total debt amounted to €6.5 million, including €1.7 million to the municipality of Maastricht. As a means of aiding its local football club, the municipality decided to waive its claim of €1.7 million and bought the stadium for €1.85 million.³⁸ The municipality held that the purchase was done in accordance with the MEIP and that the stadium would be used for multifunctional purposes. The parties agreed that MVV would use the €1.85 million to finance preferential claims, such as taxes and pensions.³⁹

The Commission opened a formal investigation procedure, because it was unable to conclude on the basis of the available information (the rescue measures were not notified⁴⁰) that the behaviour of the municipality had been that of a typical creditor in a market economy.⁴¹ Firstly, it doubted whether a total remission of the claim (€1.7 million) was necessary, since other creditors transformed their claim into a claim on future income from transfer payments or "only" waived 50% of their claim. Secondly, according to the Commission, the purchase price of the stadium was estimated on the basis of replacement value rather than the real market value. It further raised doubts as to whether the municipality acted in accordance with the MEIP since investing in a football stadium depending on one captive user entails a very high risk, even when claiming that you want to make it multifunctional.⁴² No compatibility assessment of the aid measure in favour of MVV was carried out, because the measure was not notified.⁴³

³¹ *Ibid.*, para. 30.

³² *Ibid.*

³³ *Ibid.*, para. 67.

³⁴ *Ibid.*, paras. 3–4. For more on how a citizen's letter can instigate a preliminary State aid investigation, see Van Rompuy and Van Maren (2016).

³⁵ The essence of this principle is that when a public authority invests in an enterprise on terms and in conditions that would be acceptable to a private investor operating under normal market economy conditions, the investment is not State aid. See Slocock (2002).

³⁶ SA.40168, para. 12.

³⁷ SA.33584, paras. 29–31 and 51–53.

³⁸ *Ibid.*, para. 32.

³⁹ *Ibid.*, para. 57.

⁴⁰ *Ibid.*, para. 67.

⁴¹ Commission Decision on State Aid SA.41612 of 4 July 2016 implemented by the Netherlands in favour of the professional football club MVV in Maastricht, para. 12.

⁴² SA.33584, paras. 54–57.

⁴³ SA.41612, para. 11.

2.1.3 FC Den Bosch

In 2010 it became apparent that without financial aid FC Den Bosch would have been declared bankrupt. Due to a constant decrease of turnover, the prospect of repaying its debts to, *inter alia*, the municipality of Den Bosch (to which it owed €1.65 million) were diminishing by the day.⁴⁴

The subsequent rescue operation consisted in transforming the legal structure of the club from association to limited company. The municipality, as well as the other creditors agreed to swap their loans into shares of the club. The municipality obtained 54.4% of the shares of the new limited company, whereas the remaining shares were held by other large creditors who also swapped equity for their claims.⁴⁵ The municipality's shares were then sold for €1 (one euro) to a foundation set up by the supporters' group of the football club.⁴⁶ In addition to the debt waiver, Den Bosch bought the club's training and youth block for €1.4 million, under the condition that the football club would leave the premises.⁴⁷

In its decision to launch a formal State aid investigation, the Commission found that there was an economic advantage for FC Den Bosch. Importantly, the municipality did not behave according to the market economy creditor principle, since other creditors transformed their claim into shareholding instead of selling their claim for nought. Furthermore, the municipality paid €1.4 million for a training and youth block that was registered at €1 million in the club's accounts.⁴⁸

According to the Dutch authorities, the measures did not constitute State aid. In their view, there was no economic advantage for the club, because the municipality did behave in accordance with the market economy creditor principle by waiving its claim. If FC Den Bosch had not been able to redress its financial situation in June 2011, it would have lost its licence to play professional football according to the rules of the KNVB.⁴⁹ Given that the municipality is the owner of the stadium used by FC Den Bosch,⁵⁰ it is in the interest of the municipality not to have the club lose its license since, as a consequence, the

municipality would lose its principle user and tenant.⁵¹ Moreover, the acquiring of the training facilities was done at market price on the basis of an independent expertise.⁵² Prior to the launching of the formal investigation, however, the Dutch authorities did not argue why the measure could be compatible with the internal market.⁵³

2.1.4 NEC Nijmegen

The *Eendracht* is a multifunctional sport complex owned by the municipality of Nijmegen that includes a football stadium, the *Goffert*. NEC Nijmegen, or simply “NEC”, is the main user of this stadium. A contract between NEC and the municipality of 2003 included a “purchase option” for NEC to acquire the *Eendracht* from Nijmegen.⁵⁴

In 2008, NEC announced that it was willing to drop the purchase option in exchange for €2.3 million, a price calculated on the basis of external expertise.⁵⁵ Although the 2003 contract did not stipulate a price for the complex, the municipality did conclude that NEC held a right to claim the purchase. After negotiation, the municipality agreed to buy the option for €2.2 million from NEC in September 2010.⁵⁶

In its decision to launch a formal State aid investigation, the Commission expressed doubts whether the option was sold under “normal” market conditions. Moreover, it remained unclear whether NEC had a true right to this option.⁵⁷ The Commission further highlighted the fact that NEC was facing financial difficulties that were “serious enough to endanger its future as a professional football club” in the years 2008–2010.⁵⁸ However, contrary to the other “Dutch” State aid cases, the Dutch authorities argued that NEC was *not* a firm in difficulty. Claiming that a firm is not in financial difficulty is interesting for several reasons, as will become apparent from the *Valencia* case as well. For the *NEC* case specifically, this claim is important since, as will be explained in Sect. 3, the burden of proof to demonstrate that the conditions of the so-called Rescue and Restructuring Guidelines, including demonstrating that the firm concerned is actually financial difficulty, lies with the Member State and not with the Commission.

⁴⁴ Commission Decision on State Aid SA.41614 of 4 July 2016 implemented by the Netherlands in favour of the professional football club FC Den Bosch in ‘s-Hertogenbosch, para. 8.

⁴⁵ *Ibid*, paras. 24–25.

⁴⁶ *Ibid*, para. 9.

⁴⁷ *Ibid*, paras. 10–11.

⁴⁸ Commission Decision SA.33584 of 6 March 2013 – The Netherlands Alleged municipal aid to the Professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008–2011, paras. 35–37 and 63–66.

⁴⁹ SA.41614, para. 18.

⁵⁰ *Ibid*, para. 7.

⁵¹ *Ibid*, para. 30.

⁵² *Ibid*, para. 19.

⁵³ *Ibid*, paras. 15–16.

⁵⁴ Commission Decision on State Aid SA.41617 of 4 July 2016 implemented by the Netherlands in favour of the professional football club NEC in Nijmegen, paras. 8–9.

⁵⁵ *Ibid*, para. 10.

⁵⁶ *Ibid*, paras. 10–11.

⁵⁷ SA.33584, paras. 24–28 and 45–50.

⁵⁸ *Ibid*, para. 49.

2.2 The measures in favour of Valencia CF

Valencia CF, it is worth remembering, was one of Europe's finest football clubs at the turn of the millennium. It reached back to back Champions League finals in 2000 and 2001, won the Spanish *Liga* in 2002 and 2004 and was ranked 18th in February 2008 by Deloitte in its ranking of football clubs by revenue generated.⁵⁹ To fit the club's elevated status and future ambitions, plans were presented for a new 'Mestalla' stadium in 2006, with constructions commencing in 2007.⁶⁰ The new stadium would be the property of the football club, and would be financed through bank loans, as well as through the (hypothetical) sale of the old 'Mestalla' stadium. In the years 2006–2007 it was believed that the sale of the old stadium would generate at least €350 million.⁶¹

However, Valencia CF suffered losses of €26.1 million and €59.2 million in the financial years ending in June 2007 and June 2009, respectively, while its annual turnover decreased from €107.6 million in 2007 to €99.4 million in 2008 down to €82.4 million in 2009.⁶² Moreover, the global financial crisis of 2008, and the Spanish property bubble in particular, had severe direct consequences for Valencia CF. Not only was the club incapable of finding buyers for the old stadium, but the expected sale price dropped to €250 million in 2009. In addition to that, financial data from the period 2004–2009 showed that the club was making constant losses on the transfer market.⁶³

In 2009, Valencia CF, aiming to continue the construction works on the new stadium, decided to sell new shares for a total capital injection of €92.4 million. Unfortunately, club shareholders only subscribed €18.8 million in shares. The remaining shares were therefore acquired by *La Fundación del Valencia Club de Fútbol* (a foundation especially created by the club for this purpose) becoming majority shareholder of the club (70.6%) for the sum of €75 million. This money was loaned by the bank BANCAJA (now Bankia), and guaranteed for 100% by the *Instituto Valenciano de Finanzas* (IVF), a public financing institution under the control of the government of the autonomous region of Valencia, on 5 November 2009. The

entire loan needed to be repaid by August 2015, with annual repayments of interest starting in August 2010. In order to repay the interest and the loan's capital, *La Fundación* would sell the shares acquired to third parties. Furthermore, the IVF would receive an annual guarantee premium of 0.5% and a one-off 1% commitment fee, to be paid by *La Fundación*.⁶⁴

The State guarantee also included the so-called '2009 viability plan of Valencia CF, imposing specific measures to help the club regain its financial viability. In addition to the capital increase of €92.4 million, these measures comprised making the new stadium operational as soon as possible, thereby increasing income through ticket sales and revenue generated through shops, services, etc.; selling the old stadium (once again), as well as the club's training grounds; reduce expenditure regarding the football squad (selling players, reducing salaries, etc.); and selling shares of so-called players' economic rights.⁶⁵

In 2010, *La Fundación* defaulted on its interest payment of €6 million to the bank. Consequently, a new loan of €6 million was provided by Bankia, which was once again guaranteed for 100% by IVF. The deadline for the repayment of the entire loan remained August 2015.⁶⁶

Having received information by citizens and through press reports regarding potential unlawful State aid, the European Commission officially asked Spain to comment on these reports on 8 April 2013.⁶⁷ Notwithstanding Spain's claim that there was no State aid, the Commission decided to initiate a formal investigation procedure on 18 December 2013.⁶⁸ The Commission doubted whether the guarantees provided by IVF were aligned with the so-called "2008 Guarantee Notice",⁶⁹ and doubted whether the criteria of the Rescue and Restructuring Guidelines were fulfilled, particularly since the Spanish authorities did not provide any possible grounds for compatibility.⁷⁰

To add to the complexity of the case, in October 2014 (i.e. during the formal investigation period) *La Fundación* succeeded in selling its shares to *Meriton Holdings Limited* for €100 million. This allowed *La Fundación* to repay the

⁵⁹ Deloitte, 'Football Money League', February 2008. <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Audit/gx-deloitte-football-money-league-2008.pdf>. Accessed 2 December 2016.

⁶⁰ Design & Build Network, 'Nou Mestalla Stadium, Valencia, Spain'. <http://www.designbuild-network.com/projects/nou-mestalla/>. Accessed 2 December 2016.

⁶¹ Commission Decision SA.36387 of 4 July 2016 on the State Aid for Valencia Club de Fútbol Sociedad Anónima Deportiva, Hércules Club de Fútbol Sociedad Anónima Deportiva and Elche Club de Fútbol Sociedad Anónima Deportiva, para. 23.

⁶² *Ibid.*, paras. 15 and 75.

⁶³ *Ibid.*, para. 23.

⁶⁴ *Ibid.*, paras. 6–8.

⁶⁵ *Ibid.*, para. 23. It is worth highlighting that with the last measure, in essence, the Spanish public authorities endorsed, or even encouraged, Valencia CF to engage in Third Party Ownership (TPO).

⁶⁶ *Ibid.*, para. 12.

⁶⁷ Commission Decision SA.36387 of 18 December 2013 – Spain: Alleged aid in favour of three Valencia football clubs, para. 3.

⁶⁸ *Ibid.*

⁶⁹ Commission Notice of 20 June 2008 (2008/C 155/02) on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees.

⁷⁰ Commission Decision SA.36387 of 4 July 2016, paras. 29–35.

two loans provided by Bankia which were guaranteed by the IVF.⁷¹

3 The measures constitute State aid in accordance with article 107(1) TFEU

Article 107(1) TFEU formulates the general prohibition of granting State aid.⁷² In order for a measure to constitute State aid, it has to grant a selective economic advantage to one or more undertakings, through State resources, distort or threaten to distort competition and affect trade. The European Commission considered all the measures analyzed in this article to constitute State aid within the scope of Article 107(1) TFEU. This section will explain why the Commission reached this conclusion.

3.1 The Dutch football clubs

3.1.1 Willem II

Lowering stadium rent with retroactive effect had a direct consequence on the budget of Tilburg, thus involving a transfer of State resources to Willem II. Moreover, as a professional football club, Willem II is an undertaking active in (European) football competitions⁷³ and other cross-border markets, such as the transfer market, merchandising and media coverage. Any State aid granted to Willem II could therefore distort competition and affect trade.⁷⁴

As to the question whether Willem II obtained a selective economic advantage by means of the aid measure, the Commission disagrees with the Netherlands' claim that the municipality behaved in accordance with the MEIP. Importantly, Tilburg was not making any profit from the rent and exploitation of the stadium under the original 2004 agreement. No 'normal' market economy investor would subsequently reduce that rent and decrease variable costs with the knowledge that there is no perspective whatsoever that there will be a return on the investment.⁷⁵

⁷¹ *Ibid*, paras. 24–28.

⁷² It reads as follows: “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”.

⁷³ For example, in the 1999/2000 season Willem II participated in the Champions League.

⁷⁴ SA.40168, paras. 39–40.

⁷⁵ SA.40168, paras. 32–33.

3.1.2 MVV

By way of reminder, the Commission had to assess whether a decision by Maastricht to waive a claim Maastricht of €1.7 million, and the purchase of the stadium and training facilities for €1.85 million using State resources constituted a selective advantage to MVV. The Commission believed that a 'normal' market economy investor, or operator, would not have taken these measures. Even though the municipality was not the only creditor of MVV, several private creditors transformed the debt into a future transfer payments paid to MVV for players leaving the club, instead of simply waiving the claim like Maastricht did.⁷⁶ As regards the purchase of the stadium and training grounds, the Commission disagrees with the Dutch public authorities that it took place under market conditions. The Netherlands had argued that “the municipality's reasons for buying the stadium included considerations related to 'public health' and 'social cohesion', given that it wanted to maintain and develop a 'sports zone' in the (...) area”.⁷⁷ A 'normal' market investor, however, “would only purchase such a stadium on the basis of a business plan demonstrating the strong likelihood of a sufficiently profitable exploitation”.⁷⁸ Policy objectives, such as public health and social cohesion are typical for municipalities, but not for private entities. Consequently, the Commission concluded that the measures entailed a selective advantage to MVV and that State aid in the sense of Article 107(1) TFEU had been granted.

3.1.3 FC Den Bosch

By waiving a claim of €1.65 million and paying a sum of €1.4 million, the municipality of Den Bosch granted a total of €3.05 million to FC Den Bosch, directly from State resources. Although FC Den Bosch is a small club, with no experience of European competitions,⁷⁹ it is active on the (international) transfer market and derives income from sponsorship and merchandising. Thus, for the Commission, the State aid granted to FC Den Bosch has the potential to distort competition and affect trade between Member States.⁸⁰ Arguing that the aid measures conferred a selective advantage to FC Den Bosch required more elaboration from the Commission, particularly since The Netherlands found that the municipality acted in accordance with the

⁷⁶ SA.41612, para. 27. Swapping the debt against the revenues derived from future transfers of players leaving MVV could be considered contrary to FIFA's rules on Third Party Ownership (TPO).

⁷⁷ SA.41612, para. 35.

⁷⁸ *Ibid*.

⁷⁹ SA.41614, para. 7.

⁸⁰ *Ibid*, paras. 62–63.

MEIP, and consequently did not confer a selective advantage to FC Den Bosch.⁸¹ The Commission agreed that the starting position of the municipality and the private operators involved was comparable with regard to the transaction, i.e. transforming the club's debt into shares. Nonetheless, it found it unlikely that "a private investor would have agreed to sell its non-recoverable loan which is swapped into equity for a price of €1 to a foundation".⁸² As regards the municipality's acquisition of the training complex, the Commission highlighted the fact that it was already the property of the municipality, and that FC Den Bosch used them without a long leasehold. Therefore, the valuation of the complex should not have taken place on the basis of a scenario where FC Den Bosch would have been the owner of the buildings.

3.1.4 NEC

The Dutch authorities provided a rather elaborate argument on the question whether the acquisition of NEC's purchase option for €2.2 million constituted State aid. It argued that the purchase option was subject to Dutch law and should, consequently, only be evaluated by a Dutch court. Since this agreement is based on a general measure under Dutch law,⁸³ the measure can never be selective.⁸⁴ Moreover, Dutch law stipulates that, where no price is agreed between parties, the buyer has to pay a reasonable price. The Netherlands held that €2.2 million was reasonable, because the price was based on independent valuations. In other words, the municipality acted in accordance with the MEIP when it bought NEC's purchase option.⁸⁵

The Commission, however, disagreed with the Netherlands. Even though the contract between Nijmegen and NEC is based on Dutch law, that agreement is also based on "the specific provisions of the contract between NEC and the municipality".⁸⁶ This makes the acquisition of the purchase option selective. Regarding the Dutch authorities' claim that Nijmegen acted as a typical market investor, the Commission did not understand why the value of the purchase option should equal the value of the sport complex. The Commission further noted that NEC remained the operator of the stadium even after waiving the purchase option, which allowed it to receive the same revenues.⁸⁷

Therefore, the Commission held that the compensation for NEC waiving the purchase option should have been considerably lower than €2.2 million, though it could not determine the exact amount on the basis of the information provided by the Netherlands.⁸⁸

3.2 Valencia CF

First of all, even though the State guarantees were placed on loans granted to *La Fundación del Valencia Club de Fútbol*, the Commission considered that the football club Valencia CF ultimately benefited from these guarantees.⁸⁹ In line with the Commission's consideration, this article shall therefore refer to Valencia CF as the recipient of the State aid.

The granting of State guarantees is considered a transfer of State resources in the sense of Article 107(1) TFEU, because the risk associated with the guarantee is carried by the State. If the undertaking concerned does not properly remunerate the creditor, the State will lose financial resources.⁹⁰ The fact that Valencia CF defaulted on its interest payment of €6 million in 2010, which led to an additional bank loan plus State guarantee, demonstrates the sort of burden that is placed upon the State guaranteeing such loans. The main question in this case was, however, whether Valencia CF obtained a selective advantage by means of the State guarantees. Said differently, did the *Instituto Valenciano de Finanzas*, act in accordance with the MEIP?

In its submissions to the Commission, Spain claimed that the IVF did act like a proper market investor, because the club's economic prospects were good at the time the aid was granted "especially from the operations of the club's new stadium".⁹¹ Moreover, the fact that *Meriton Holdings Limited* bought *La Fundación's* shares in 2014 for €100 million, thereby granting *La Fundación* a profit of nearly €8 million, further demonstrated Valencia CF's healthy economic prospects. In addition, Spain argued that the provisions of the 2008 Guarantee Notice were complied with, since the guarantee fees of the loans (i.e. the annual guarantee premium of 0.5% and a one-off 1% commitment fee) were at market level.⁹²

In its submission as an interested (third) party, Valencia CF went a step further and claimed that it was not in financial difficulty at the time of the guarantees' granting. Although the club did have a negative equity during the

⁸¹ *Ibid*, paras. 17–30.

⁸² *Ibid*, para. 53.

⁸³ The agreement is based on Article 6:217 of the Dutch Civil Code, which, according to the Netherlands, has a general scope and is applicable to all undertakings.

⁸⁴ SA.41617, paras. 24–29.

⁸⁵ *Ibid*, paras. 30–36.

⁸⁶ *Ibid*, para. 49.

⁸⁷ *Ibid*, para. 57.

⁸⁸ *Ibid*, para. 65.

⁸⁹ Commission Decision SA.36387 of 4 July 2016, para. 32.

⁹⁰ Commission Notice on State aid in the form of guarantees, point 2.1.

⁹¹ Commission Decision SA.36387 of 4 July 2016, para. 39.

⁹² *Ibid*, para. 38.

2007–2009 period, the club argued that the Commission failed to assess Valencia CF's real economic situation correctly. Importantly, the club held that the aggregated book value of the club's registered football players (purchase cost minus annual amortization) is not representative of the real market value of these players. Where the book value, as reflected in the club's 2008/09 accounts, was 'only' €95.7 million, the overall market value of the players (as estimated by Valencia CF) was approximately €235.7 million. Such an elevated market value, together with the fact that Valencia CF made a profit of €64.2 million on the transfer market in the financial year 2010,⁹³ shows that the club was not in financial difficulty.⁹⁴

Valencia CF's argument is particularly interesting and requires further elaboration. A State guarantee that complies with the conditions set in the 2008 Guarantee Notice will be considered not to entail an economic advantage in the sense of Article 107(1) TFEU. Consequently, that measure will not be considered to constitute State aid. As can be read from point 3.2 (a) of the Notice, the first condition that needs to be complied with is that the borrowing firm in question cannot be in financial difficulty when the State guarantee is provided. The Commission's reasoning behind this rule is that a State guarantee may help a failing firm remain active instead of being eliminated or restructured, thereby possibly creating distortions of competition.⁹⁵ If the borrowing firm *is* in financial difficulty, however, the State guarantee could be considered possible compatible State aid under the 2004 Rescue and Restructuring Guidelines.⁹⁶ Although the next section of this article will elaborate further on the Rescue and Restructuring Guidelines, at this stage one cannot underestimate the importance for the Member State granting the State guarantee to know whether the recipient is in financial difficulty or not, due to the different conditions and procedures applicable to one and the other, i.e. Notice on State guarantees or Rescue and Restructuring Guidelines. In that regard, in order to avoid possible State aid problems, the Commission recommends notification of the planned guarantee by the Member State concerned,⁹⁷ something that neither the Spanish public authorities nor Valencia CF did when implementing the measure.⁹⁸

⁹³ According to Valencia CF, it sold players for €78.7 million, whereas spending on new signings totalled €14.5 million.

⁹⁴ Commission Decision SA.36387 of 4 July 2016, para. 46 (under (c)).

⁹⁵ Commission Notice on State aid in the form of guarantees, point 2.2.

⁹⁶ Communication from the Commission of 1 October 2004 (2004/C 244/02) Community Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 11.

⁹⁷ Commission Notice on State aid in the form of guarantees, point 3.6.

⁹⁸ Commission Decision SA.36387 of 4 July 2016, para. 96.

The importance of this distinction is demonstrated by the Commission's conclusion that Valencia CF was, in fact, in financial difficulty before the measures under scrutiny were implemented.⁹⁹ Keeping in mind the content of the 2009 Viability Plan, which included measures specifically aimed at restoring economic viability,¹⁰⁰ this conclusion can hardly come as a surprise. Indeed, Spain itself acknowledged that Valencia CF was in financial difficulty in 2009.¹⁰¹ It is therefore somewhat surprising that the club is insisting otherwise. Although there is no EU law definition of what constitutes a firm in difficulty,¹⁰² it is established case law that the existence of negative own capital may be considered an important indicator that an undertaking is in a difficult financial situation.¹⁰³ Furthermore, the Commission noted that the high book value of Valencia CF's football players does not mean that the club was not in financial difficulty. It stated that the "fire sale value"¹⁰⁴ of the same players would be relatively low because buyers would use the known fact of Valencia CF's difficulties in order to push for low prices. In addition, players' market value depends largely on random events like injuries etc., which makes such market value considerably volatile.¹⁰⁵ Consequently, the criterion established in point 3.2 (a) of the Notice on State guarantees was not met.

The Notice on State guarantees further elucidates that a guarantee cannot cover more than 80% of the outstanding loan.¹⁰⁶ As is explained in Sect. 2.2 of this article, both guarantees provided by the IVF covered 100% of the bank loans, meaning that this condition was also not complied with. Furthermore, the Commission held that "the annual guarantee premiums of 0.5–1% charged for the guarantees in question cannot be considered as reflecting the risk of default for the guaranteed loans, given the (financial) difficulty of Valencia CF".¹⁰⁷ In other words, the guarantee

⁹⁹ *Ibid.*, paras. 71–82.

¹⁰⁰ See Sect. 2.2 above.

¹⁰¹ Commission Decision SA.36387 of 4 July 2016, para. 42. As was explained in Sect. 2.2, Valencia CF suffered losses of €26.1 million and €59.2 million in the financial years ending in June 2007 and June 2009, respectively, while its annual turnover decreased from €107.6 million in 2007 to €99.4 million in 2008 down to €82.4 million in 2009.

¹⁰² Quigley (2015), p 405. See also e.g. T-349/03, *Corsica Ferries France v Commission*, ECLI:EU:T:2005:221, para. 183.

¹⁰³ T-102/07, *Freistaat Sachsen v Commission*, ECLI:EU:T:2010:62, para. 106.

¹⁰⁴ A fire sale is the sale of assets at discounted prices, typically when the seller faces bankruptcy.

¹⁰⁵ Commission Decision SA.36387 of 4 July 2016, para. 82.

¹⁰⁶ Commission Notice on State aid in the form of guarantees, point 3.2 (c).

¹⁰⁷ Commission Decision SA.36387 of 4 July 2016, para. 86.

fees were not established at market level, and therefore constitute an economic advantage for Valencia CF.

The Commission further disagreed with Spain's claim that the IVF acted in accordance with the MEIP due to the 2009 viability plan. Firstly, the plan did not include a sensitivity analysis of the risks that could have an impact on the financial performance of the football club, such as positions in *La Liga's* rankings, changes on the transfer market and, most importantly in this case, changes in prices on the real estate market.¹⁰⁸ Secondly, the viability plan "did not include any elements of recovery of Valencia CF from its annual losses or significantly high levels of debt and lacked credible and elaborated financial forecasts that a sound and credible viability plan should include".¹⁰⁹ The lack of a credible viability would prevent a "normal" market economic investor of providing a guarantee on a loan in similar fashion as the IVF.

Finally, the fact that *Meriton* bought *La Fundación's* shares in 2014 for €100 million is irrelevant for the Commission, because a purchase of shares that took place that long after the State guarantees were provided is not representative of the club's financial situation in 2009 and 2010.¹¹⁰

All of the above led the Commission to conclude that the two State guarantees entailed State aid granted to Valencia CF. The next step of the Commission's analysis was deciding whether the measures could be declared compatible with the internal market.

4 The rules on compatibility

The general prohibition of Article 107(1) TFEU is neither absolute nor unconditional.¹¹¹ When a measure qualifies as State aid, the Member State concerned has the opportunity to prove that the conditions for the application of one of the derogations apply. In the case of the professional football sector, where a measure fulfils the criteria of Article 107(1) TFEU, the Member State in question will likely use the provision in Article 107(3)(c) TFEU to derogate from the general prohibition.¹¹² Pursuant to Article 107(3)(c) TFEU, aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered compatible with the internal market.

¹⁰⁸ *Ibid.*, para. 58.

¹⁰⁹ *Ibid.*, para. 59.

¹¹⁰ *Ibid.*, para. 60.

¹¹¹ Quigley (2015), pp 193–194.

¹¹² Aid could also be declared compatible under 107 (3)(a), (b) and (d) TFEU, but these provisions are less relevant for the football sector.

Only the Commission has the competence (subject to control by the EU Courts) to determine whether or not certain aid merits derogation from the general prohibition of Article 107(1).¹¹³ However, it is settled case law that it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met.¹¹⁴ Due to its own wide discretion to assess the compatibility, the Commission has developed its own methodologies and approaches over the years, found in the decisional practice, policy documents¹¹⁵ and sector specific guidelines.¹¹⁶

4.1 The rescue and restructuring guidelines

As regards the compatibility assessment of State aid measures granted with the objective to rescue (and restructure) firms in financial difficulty, the Commission devised a set of rules known as the Community Guidelines on State aid for rescue and restructuring firms in difficulty (hereinafter: "Rescue and Restructuring Guidelines"). The first Guidelines were published in 1994 and primarily serve as a tool for the Commission to assess similar cases in a similar way. The criteria and conditions laid down in the Guidelines are mostly based on the Commission's own experience in dealing with cases involving State aid in favour of firms in difficulty and case law by the Court of Justice of the EU.¹¹⁷ Due to the continuous developments in the area of EU State aid law, the Guidelines are regularly updated.¹¹⁸ However, and as was already explained in the introduction, this article will mostly refer to the 2004 Rescue and

¹¹³ According to settled case law, national courts do not have the power to declare a State aid measure compatible with the internal market. See e.g. C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic*, ECLI:EU:C:1991:440, para. 14.

¹¹⁴ SA.41612, para. 42; see also Case C-364/90, *Italy v Commission*, ECLI:EU:C:1993:157, point 20.

¹¹⁵ See for example Communication from the Commission COM(2012) of 8 May 2012 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation (SAM), para. 12.

¹¹⁶ See for example the Communication from the Commission OJ C25/01 of 26 January 2013 on the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, paras. 32–34.

¹¹⁷ Slot (2012), page 914. Indeed, a large amount of cases used for the first Guidelines of 1994 derive from aid granted to undertakings in the former German Democratic Republic that suffered financially after Germany's reunification.

¹¹⁸ The Rescue and Restructuring Guidelines published in 2014 are the fourth of its sort after earlier versions published in 1994, 1999 and 2004.

Restructuring Guidelines,¹¹⁹ since these were applicable to the State aid measures analyzed.

The Guidelines can be considered as one of the most important soft law documents in the field of State aid, because rescuing and/or restructuring an undertaking through State aid is potentially one of the most distortive types of State aid.¹²⁰ It allows a company to survive where normal play of market forces would have resulted in it ceasing activities and leaving the market. Keeping a company alive can be highly beneficial for employees and customers in the short-run on the one hand, but it is questionable whether it is worth rescuing an inefficient company at the expense of the taxpayers and long run health of the economy on the other hand.¹²¹

Given that its very existence is in danger, a firm in difficulty cannot be considered as an appropriate vehicle for promoting other public policy objectives.¹²² Consequently, the compatibility of aid intended to financially strengthen firms in financial difficulty is to be determined solely under the Rescue and Restructuring Guidelines, and not under other sector specific guidelines drafted by the Commission.¹²³

Rescue aid is commonly defined as temporary assistance to keep an ailing firm afloat for the time needed to work out a restructuring plan.¹²⁴ Restructuring aid, for its part, will be based on a feasible, coherent and far-reaching plan to restore a firm's long-term viability,¹²⁵ and cannot, in principle, take place during the rescue phase.¹²⁶ However, it is widely acknowledged that the rescue and the restructuring are often two parts of a single operation, even if they involve different processes.¹²⁷ Firms in difficulty may already need to take certain urgent structural measures to halt or reduce a worsening of the financial situation in the rescue phase.¹²⁸ The possibility to combine rescue – and restructuring aid into one operation is also evident from the cases involving State aid granted to professional football clubs in financial difficulty analysed in this article. As will

be shown below, in its assessment the Commission does not make a distinction between one and the other.

4.1.1 *The notification obligation and the qualification of a firm in difficulty*

In the 2004 Guidelines, the Commission sets out the conditions under which State aid for rescuing and restructuring undertakings in difficulty may be considered compatible with the internal market. These conditions include the notification obligation for the Member State,¹²⁹ as well as demonstrating that the firm qualifies as 'a firm in difficulty'. As is explained above in Sect. 3.2, there is no exact definition under EU law of a firm in difficulty. Nonetheless, these Guidelines do stipulate that a firm is regarded in difficulty if, *inter alia*, more than half of its registered capital has disappeared, or where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.¹³⁰ In any case, a firm may still be considered in financial difficulty where the 'usual' signs of a firm being in difficulty are present (such as increasing losses, diminishing turnover and mounting debt), and when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term.¹³¹

4.1.2 *The restructuring plan and large enterprises versus SMEs*

Section 3.2 of the Guidelines requires that the grant of the aid must be conditional on the implementation of a restructuring plan, which must be communicated to the Commission.¹³² This restructuring plan, which is aimed at restoring the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions, will require the full commitment by the Member State concerned.¹³³ The plan must take account of the future (financial) prospects, with scenarios reflecting best-case, worst-case assumptions, and must provide for a turnaround that will enable the firm, after completing its restructuring, to cover all its costs.¹³⁴

If the firm in financial difficulty is considered a 'large enterprise', the restructuring plan will have to be approved by the Commission.¹³⁵ A restructuring plan concerning a

¹¹⁹ Communication from the Commission of 1 October 2004 (2004/C 244/02) Community Guidelines on State Aid for Rescuing and Restructuring firms in difficulty.

¹²⁰ Buts et al. (2016), page 338.

¹²¹ Valle and Van de Castele (2004), page 9.

¹²² The 2004 Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 20.

¹²³ Craven (2014a), page 585.

¹²⁴ The 2004 Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 6.

¹²⁵ *Ibid*, point 17.

¹²⁶ *Ibid*, point 6.

¹²⁷ Valle and Van de Castele (2004), page 9.

¹²⁸ The 2004 Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 6.

¹²⁹ *Ibid*, point 25(c).

¹³⁰ *Ibid*, point 10.

¹³¹ *Ibid*, point 11. See also Quigley (2015), page 405.

¹³² The 2004 Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 34.

¹³³ *Ibid*, points 35.

¹³⁴ *Ibid*, points 36–37.

¹³⁵ *Ibid*, point 34.

small or medium-sized enterprise, on the other hand, does not need to be endorsed by the Commission.¹³⁶ As is stipulated in the 2003 Recommendation concerning the Definition of Micro, Small and Medium-Sized Enterprises,¹³⁷ a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed €10 million, whereas a medium-sized enterprise is defined as an enterprise which employs fewer than 250 persons and which has an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million. A large enterprise, therefore, employs more than 250 persons, has an annual turnover exceeding €50 million and/or has an annual balance sheet total that exceeds €43 million. It is important to note that the conditions in the Recommendation are cumulative. In other words, if one of the conditions is not met (e.g. the firm employs less than 250 persons, but has an annual turnover of more than €50 million), then the firm in question is considered a ‘large enterprise’ and not a ‘medium-sized enterprise’.

4.1.3 Aid limited to the minimum

The condition that aid needs to be limited aid to what is strictly necessary and the introduction of compensatory measures have the aim of ensuring that the State aid measure is proportionate to the objective tackled, namely rescuing and/or restructuring a firm in difficulty.

The Member States granting the restructuring aid will have to limit the amount and intensity of the aid to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the firm.¹³⁸ This also means that the beneficiaries are expected to make a significant contribution to the restructuring plan from their own resources.¹³⁹ The Commission will normally consider the following contributions to the restructuring to be appropriate: at least 25% in the case of small enterprises, at least 40% for medium-sized enterprises and at least 50% for large firms.¹⁴⁰

4.1.4 Compensatory measures

The Guidelines also stipulate that, in case the firm in difficulty is considered a medium-sized enterprise or larger, compensatory measures must be taken by the Member State that grants the rescue and/or restructuring aid in order to ensure that the adverse effects on trading conditions are minimized as much as possible, so that the positive effects pursued outweigh the adverse ones.¹⁴¹ The compensatory measures should take place in the market sector (or sectors) where the firm has a market position and which affect the beneficiary’s presence on that market.¹⁴² Importantly moreover, these measures cannot consist of write-offs and/or closure of loss-making activities which would at any rate be necessary to restore viability of the firm. These measures will not be considered reduction of capacity or market presence for the purpose of the assessment of the compensatory measure.¹⁴³ To give an example, in November 2015 the Commission rejected as an adequate compensatory measure Estonia Air’s proposal to stop flying certain routes with the objective of reducing its air capacity. According to the Commission, “in order for those routes to be counted as compensatory measures, they must be profitable because otherwise they would have been cancelled in any event for viability reasons”.¹⁴⁴ In other words, Estonia Air was to a large extent in financial difficulty thanks to flying certain unprofitable routes. The decision not to fly these routes anymore should not be seen as a compensatory measure, but rather as a restructuring measure.

4.1.5 The “one time, last time” principle

Last but not least, the so-called ‘one time, last time’ principle prevails. In its case law, the General Court found this principle of particular importance in the assessment of the compatibility of restructuring aid with the internal market.¹⁴⁵ An undertaking that needs a second shot of rescue and/or restructuring aid demonstrates that its difficulties are either of a recurrent nature or were not dealt with adequately before.¹⁴⁶ The ‘one time, last time’

¹³⁶ *Ibid*, point 59.

¹³⁷ Annex of the Commission Recommendation of 6 May 2003 (2003/361/EC) concerning the definition of micro, small and medium-sized enterprises, is also used in the Rescue and Restructuring Guidelines, Article 2.

¹³⁸ *Ibid*, point 25(d).

¹³⁹ By “own resources” the Commission also understands funding from external financiers at market conditions.

¹⁴⁰ The 2004 Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, points 43–44.

¹⁴¹ *Ibid*, point 38.

¹⁴² Commission Decision SA.37792 of 8 June 2016 on the State Aid which Slovenia is planning to implement for the Cimos Group, para. 166, and T-115/09 and T-116/09, *Electrolux and Whirlpool (FagorBrandt)*, ECLI:EU:T:2012:76, para. 53.

¹⁴³ The 2004 Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 40.

¹⁴⁴ Commission Decision 36868 of 6 November 2015 on the measures which Estonia is planning to implement for AS Estonian Air, para. 194.

¹⁴⁵ Case T-511/09, *Niki Luftfahrt GmbH v Commission* ECLI:EU:T:2015:284, para 115.

¹⁴⁶ Quigley (2015), p 406.

principle should not be interpreted entirely literally, since, as is written in the Guidelines, in practice this actually means that rescue or restructuring aid can only be granted once every 10 years.¹⁴⁷

5 The compatibility of the rescue aid to professional football clubs (re-) assessed

5.1 The four Dutch football clubs

Even though it was the Netherlands' task to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility were met, the aid granted to all four Dutch football clubs was never notified. The Netherlands' failure to fulfil its notification obligation, therefore, appears to be at odds with the Commission's final decision to declare the aid compatible with EU law. Yet, a closer look at the Commission's decision of 6 March 2013 to launch the formal investigation shows that the Commission was giving the Netherlands a 'second chance' to invoke grounds that would lead to a justification of the measures. In paragraph 74, the Commission itself reached the conclusions that the clubs in question faced financial difficulties, consequently indicating that the Rescue and Restructuring Guidelines might apply. In fact, the Commission even suggested possible compensatory measures, which are very much related to "the peculiar nature of professional football".¹⁴⁸ These suggested compensatory measures included:

- Limiting the club's number of registered players for a season or several seasons;
- Accepting a cap on the relation between salaries and turnover;
- Banning the payment of transfer fees for a certain period;
- Offering additional expenditure on "pro bono" activities to the benefit of the community and training of amateurs.¹⁴⁹

Furthermore, it invited the Dutch authorities "to provide all useful information allowing the Commission to decide whether the aid measures can be considered compatible with the Guidelines".¹⁵⁰

The observations and information submitted by the Netherlands between March 2013 and July 2016 proved more than sufficient for the Commission to carry out its compatibility assessment. As was insinuated in the decision to launch a formal investigation, the 2004 Rescue and Restructuring Guidelines proved fundamental to this assessment.

5.1.1 *The Dutch football clubs as firms in financial difficulty*

This first condition of the Guidelines was easily complied with. As regards Willem II, in the accounting year 2008/2009, it made a loss of €3.9 million on a turnover of €11.4 million. Meanwhile, its own equity decreased from €4.1 million to €200.000. The losses increased to €4.4 million on a turnover of €9.9 million for the 2009/2010 season, while its own equity decreased further from €200.000 to minus €2.1 million.¹⁵¹

MVV was clearly not doing much better. As the Commission itself summarizes in the MVV decision, "in 2008/2009, MVV made a loss of €1.1 million and its own equity was minus €3.8 million. By March 2010 additional losses amounting to €1.3 million had occurred and the own equity had dropped to minus €5.17 million. In April 2010, MVV was no longer able to pay salaries and other current expenditure and was on the brink of bankruptcy."¹⁵²

In 2010, FC Den Bosch had a negative equity of €4.6 million, a figure that increased to €5.4 million in 2011. Furthermore, its losses were constantly increasing, while its turnover was constantly decreasing. By the end of 2010 it became clear that, without financial assistance, the club would go bankrupt.¹⁵³

The description of the financial situation of NEC in the opening decision and in the final decision is more peculiar. In the opening decision, the Dutch authorities had explicitly argued that NEC was not in financial difficulty, a statement contradicted by the Commission.¹⁵⁴ An analysis of the comments made by the Netherlands during the formal investigation shows a U-turn in this regard. The Dutch government put forward evidence demonstrating that NEC had a negative equity, a negative development of working capital and declining incomes.¹⁵⁵ The Commission acknowledged the evidence provided and concluded that

¹⁴⁷ The 2004 Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 25(e) and Sect. 3.3.

¹⁴⁸ Commission Decision on State Aid SA.40168 of 4 July 2016 implemented by the Netherlands in favour of the professional football club Willem II in Tilburg, para. 50.

¹⁴⁹ Commission Decision SA.33584 of 6 March 2013 – The Netherlands Alleged municipal aid to the Professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008–2011, para. 80.

¹⁵⁰ *Ibid*, para. 77.

¹⁵¹ SA.40168, para. 45.

¹⁵² Commission Decision on State Aid SA.41612 of 4 July 2016 implemented by the Netherlands in favour of the professional football club MVV in Maastricht, para. 13.

¹⁵³ SA.41614, paras.8–9.

¹⁵⁴ SA.33584, para. 49.

¹⁵⁵ SA.41617, para. 40. The exact figures of NEC's financial situation are kept confidential.

NEC was a football club in financial difficulty at the moment the aid was granted.¹⁵⁶

Another consequence of being in financial difficulty relates to the licensing system put in place by the Dutch football federation KNVB. As is explained in paragraph 11 of the decision to open a formal investigation, one of the obligations for clubs under the current system is submitting three financial reports a year to the KNVB. On the basis of these reports clubs are scaled in three categories (I: insufficient, II: sufficient, III: good). Clubs in category I may be obliged to present a plan for improvement in order to reach categories II or III. If the club fails to comply with the plan, sanctions may be imposed by the KNVB, including an official warning, a reduction of competition points and – as ultimate sanction – withdrawal of the licence.¹⁵⁷ As can be read in the Commission's decisions, at the time the State aid was granted, Willem II MVV and NEC were all scaled in the insufficient category I.¹⁵⁸ Moreover, given FC Den Bosch's critical financial situation at the time the aid measures were granted in 2010 and 2011,¹⁵⁹ one can safely assume that the KNVB had scaled the club in category I as well.

5.1.2 *The Dutch football clubs as small enterprises or medium-sized enterprises*

This particular assessment is important for the two conditions below, i.e. the introduction of restructuring plans and compensatory measures. Depending on the size of the firm (or enterprise), different conditions apply.

Willem II and NEC are both medium-sized enterprises. Willem II employed 53 people in 2012 and had an annual turnover of €11.4 million in 2008/2009.¹⁶⁰ Pursuant to the Annex of the Commission Recommendation concerning the definition of micro, small and medium-sized enterprises, Willem II just managed to be considered a medium-sized enterprise.¹⁶¹ NEC, meanwhile, had a fluctuating number of 60–70 employees between 2010 and 2015, and is thus a medium-sized enterprise.¹⁶²

MVV and FC Den Bosch are, on the other hand, considered small enterprises. In the season 2009/2010, MVV had 38 employees and in the season 2010/2011 it had 35 employees. Its turnover and balance sheet total remained

well below €10 million in both years.¹⁶³ FC Den Bosch is even smaller, having only 31 employees in 2011/2012. Its turnover and balance sheet was €3 million for that year.¹⁶⁴

5.1.3 *Restructuring plans*

Though not initially communicated to the Commission, all rescue measures imposed restructuring conditions. In principle, these consisted of reducing personnel costs by introducing new managements, selling players, and signing players free of transfer payments. By way of reminder, restructuring plans concerning SMEs do not need to be approved by the Commission under the 2004 Rescue and Restructuring Guidelines.¹⁶⁵

In the case of Willem II, in the two years following the rescue measure personnel costs were reduced by 30%.¹⁶⁶ The effects of MVV's restructuring plan were even stronger, since it managed to book profits for the three seasons following the aid and was scaled in the highest category (III) by the KNVB at the beginning of the season 2011/2012.¹⁶⁷ FC Den Bosch too promised to cut staff and players, while abstaining from paying transfer fees for new players,¹⁶⁸ but also abandoned its training to reduce costs.¹⁶⁹ As part of its restructuring plan, NEC limited salaries of new players and reduced bonuses. Furthermore, as is stated in the *NEC* decision, “any investments in immaterial or mater fixed assets of more than [a certain amount] had to be agreed by the KNVB license commission, which actually meant that NEC could not do any transfers”.¹⁷⁰

5.1.4 *Compensatory measures*

For the compensatory measures it is important to take into account point 41 of the Rescue and Restructuring Guidelines. Under this provision, small enterprises, such as MVV and FC Den Bosch, are not required to take compensatory measures. However, this exception did not apply to Willem II and NEC. In this regard, the Commission noted more expenditure by Willem II on the training of amateurs and a reduction of the number of registered players from 31 to

¹⁵⁶ *Ibid*, para. 73.

¹⁵⁷ SA.33584, para. 11.

¹⁵⁸ SA.40168, para. 22; SA.41612, para. 52; and SA.41617, para. 76.

¹⁵⁹ SA.41614, paras.8–9.

¹⁶⁰ SA.40168, para. 9.

¹⁶¹ A firm is not considered a small enterprise if it has more than 50 employees and an annual turnover of more than €10 million. *Supra* note 137.

¹⁶² SA.41617, para. 7.

¹⁶³ SA.41612, para. 9.

¹⁶⁴ SA.41614, para. 7.

¹⁶⁵ Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 59.

¹⁶⁶ SA.40168, para. 48.

¹⁶⁷ SA.41612, para. 52.

¹⁶⁸ SA.41614, para. 38. It appears that FC Den Bosch has kept this promise, since, according to www.transfermarkt.de, it has not paid a transfer fee since 2006. Accessed 18 October 2016.

¹⁶⁹ SA.41614, paras. 34 and 70.

¹⁷⁰ SA.41617, para. 77.

27. Similarly, no transfer payments were made during the restructuring period.¹⁷¹ Potentially as a result of this, Willem II was relegated to the second league in 2011 and again in 2013. In the end, the Commission concluded that “the compensatory measures required by the Guidelines were taken, which had the effect of weakening Willem II’s competitive position in professional football”.¹⁷² Regarding NEC, the Commission noted the cost reduction of wages below 60% of the turnover level.¹⁷³ With this, the Commission referred to its suggested compensatory measures as found in the opening decision,¹⁷⁴ but also indirectly referred to UEFA’s Financial Fair Play Rules, which foresees that the cost of salaries should not exceed 70% of turnover.¹⁷⁵ Such a salary reduction weakened the competitive position of NEC,¹⁷⁶ and was thus accepted by the Commission as a compensatory measure in the sense of the Rescue and Restructuring Guidelines.¹⁷⁷

5.1.5 Aid limited to a minimum

Since the aid measures rescued both football clubs from bankruptcy without creating equity surplus, the Commission believed the amount of aid granted limited to what was necessary. Furthermore, the Commission highlighted that the restructuring plans were to a large extent financed by external contributors just as the Rescue and Restructuring Guidelines requested. Private entities had agreed to lend €2.25 million to Willem II for the restructuring, which is well over the 40% of €2.4 million (the total amount of State aid granted) required for medium-sized enterprises under the Guidelines.¹⁷⁸ In the case of MVV, several private creditors decided to waive (part of) their debt, which amounted to €2.25 million. This amount is more than 25% of the €5.8 million granted by the Netherlands, the minimum requirement for a small enterprise like MVV.¹⁷⁹ Private contributions for the rescue of FC Den Bosch amounted to €3.7 million, also more than 25% of the €3.1 million granted by the municipality.¹⁸⁰

5.1.6 The “one time, last time” principle

The Commission believes this condition to be fulfilled, as the Netherlands specified that the four Dutch clubs concerned did not receive rescue or restructuring aid in the ten years before the aid measures, nor will it award any new rescue or restructuring aid to the clubs during a period of ten years.¹⁸¹

5.2 Valencia CF

As a preliminary remark, it should be noted that the State guarantees were never notified to the Commission.¹⁸² Although not meeting the notification obligation qualifies the aid measures *prima facie* as “unlawful”, this does not mean that the measures are automatically incompatible, as the Dutch cases have shown. In this respect, Spain considered that if the Commission were to find State aid in the State guarantees (which the Commission did), these measures would be compatible as restructuring aid under the Rescue and Restructuring Guidelines.¹⁸³ The following paragraphs will explain why the Commission concluded that the criteria of the Guidelines were not complied with.

5.2.1 Valencia CF as a firm in financial difficulty

The ‘firm in financial difficulty’ criterion was the only condition complied with. This is undoubtedly rather ironic, given that, as is stated in Sect. 3.2 of this article, Valencia CF continuously emphasized that it was not in financial difficulty. This point of view is not only contrary to the Commission’s, but also to Spain’s, which held that the club was very much in financial difficulty.¹⁸⁴ In any case, the fact that Valencia CF suffered losses of over €70 million while seeing its turnover decrease from €107.6 million to €82.4 million between 2007 and 2009,¹⁸⁵ cannot be denied.

¹⁷¹ SA.40168, para. 51. Indeed, according to www.transfermarkt.de, Willem II only paid a mere €20,000 for the signing of Kevin Brands in July 2012. Accessed 14 October 2016.

¹⁷² *Ibid.*

¹⁷³ SA.41617, para. 82.

¹⁷⁴ SA.33584, para. 80.

¹⁷⁵ UEFA Club Licensing and Financial Fair Play Regulations, Edition 2015, Article 62(4).

¹⁷⁶ Indeed, following the aid measure of September 2010, it gradually started performing worse in the national league, culminating with a relegation to the second league at the end of the 2013/2014 season. It was the only relegation in more than 20 years.

¹⁷⁷ SA.41617, para. 82.

¹⁷⁸ SA.40168, para. 52.

¹⁷⁹ SA.41612, para. 54.

¹⁸⁰ SA.41614, para. 72.

¹⁸¹ SA.40168, para. 55 and SA.41612, para. 61.

¹⁸² Commission Decision SA.36387 of 4 July 2016, para. 96.

¹⁸³ *Ibid.*, para. 104. Valencia CF itself argued that the first State guarantee was in line with the Communication from the Commission (2009/C 83/01) of 7 April 2009 - Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, and therefore compatible under Article 107(3)(b) TFEU. The Commission, however rejected this argument, because this Framework does not apply to firms that were in financial difficulty before 1 July 2008 (Sect. 4.2.2. of the Framework). According to the Commission, Valencia CF was already in financial difficulty in 2007 (Commission Decision SA.36387 of 4 July 2016, para. 99). The club made no attempt to argue that the measures needed to be declared compatible under the 2004 Rescue and Restructuring Guidelines.

¹⁸⁴ Commission Decision SA.36387 of 4 July 2016, para. 42 and 104.

¹⁸⁵ *Ibid.*, paras. 15 and 75. See also Sect. 3.2.

5.2.2 Valencia CF as a large enterprise

Although Valencia CF's annual turnover diminished from €107.6 million to €82.4 million between 2007 and 2009, it still exceeded the threshold of €50 million needed to be considered a 'medium-sized enterprise' in the sense of the 2003 Recommendation concerning the Definition of Micro, Small and Medium-Sized Enterprises. Thus, Valencia CF is considered to be a 'large enterprise'.

5.2.3 Restructuring plans

Contrary to the *Dutch* cases, as a consequence of falling in the category of 'large enterprises', any restructuring plan submitted by Spain needed the Commission's approval.¹⁸⁶ Spain and Valencia CF's restructuring plan, or the 2009 Viability Plan as it became known, included reduced expenditure in the football squad, the sale of land plots and the sale of players' rights during the first two years of the plan. According to the plan, these measures would allow the club to start making operating profits again by June 2013.¹⁸⁷ However, the plan did not include the best-case, worst-case scenario required under the Rescue and Restructuring Guidelines.¹⁸⁸ In its decision, the Commission noted the possible risks that could impact Valencia CF's restructuring, namely "the effect of the club's different possible placements in the championships final ranking, changes in the prices in the real estate market, in the sponsoring market or in the broadcasting market, potential risks regarding the ability of fans to pay season or single-match tickets, injury risks of players, changes in the market of players' transfers etc."¹⁸⁹ Another point of criticism was the assumption that long term viability would not be restored until four years after the granting of the first State guarantee. The Commission believed this not to be within a "reasonable time-scale" in the sense of the Rescue and Restructuring Guidelines.¹⁹⁰

5.2.4 Compensatory measures

As a compensatory measure, Spain proposed that Valencia CF were to sell its most valuable football players.¹⁹¹ An analysis of the club's transfer activities during the transfer windows following the granting of the first State guarantee showed that the club indeed sold its most valuable players.

David Villa was sold in the summer of 2010 for €40 million, while, according to *Transfermarkt*, having a market value of €45 million. That same summer, Valencia CF sold David Silva, who at that time had a market value of €32 million, for 'only' €28.5 million. The following year, Juan Mata was sold for €26 million, though this figure actually represented his market value. The income from selling players totalled €117.25 million the two years following the granting of the first State guarantee. Simultaneously, and deviating from the *Dutch* cases, Valencia CF did not abstain from buying players during the 'restructuring period', and spent a total of €61.85 million in this same period.¹⁹²

As can be read in the decision, the Commission did not approve the proposed (and perhaps carried out) compensatory measures. The Commission referred to Spain and Valencia CF's own Viability Plan, which stated that one of the reasons that the club was in a difficult economic situation was, in fact, the loss-making in buying and selling players' rights.¹⁹³ Given that the sales of players like Villa and Silva were part of the club's loss-making activity, "those sales cannot be considered as bringing a reduction of capacity or performance in Valencia's profitable areas of activity. (...) Even if those sales could ultimately benefit a competitor, their primary aim was to enable the recovery of Valencia. Therefore, they cannot be considered as bringing any benefit to Valencia CF's competitors."¹⁹⁴ In summary, the sale of Valencia CF's most valuable players was considered a necessary restructuring measure, not a compensatory measure. Rejecting the selling of a club's most valuable players as an adequate compensatory measure might appear counterproductive. Especially in the case of Valencia CF, a team which has consistently sold its best players to its main competitors since the State aid measures were implemented, thereby making itself clearly less competitive. Furthermore, it might not be unreasonable to think that the club deserved the benefit of the doubt, since the Commission itself did not exactly know in 2012 what compensatory measures were to be considered acceptable.¹⁹⁵ However, and as will be further explained below in Sect. 6, based on the information available one does get the impression that the Spanish authorities, as well as the club concerned, did a poor job at realising that the mere selling of players would be deemed insufficient under the Rescue and Restructuring Guidelines.

¹⁸⁶ *Ibid*, para. 106.

¹⁸⁷ Commission Decision SA.36387 of 4 July 2016, paras. 23–24.

¹⁸⁸ The 2004 Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 36.

¹⁸⁹ Commission Decision SA.36387 of 4 July 2016, para. 110.

¹⁹⁰ *Ibid*, para. 111.

¹⁹¹ *Ibid*, para. 116.

¹⁹² All these figures were taken from www.transfermarkt.de. Accessed 20 December 2016.

¹⁹³ Commission Decision SA.36387 of 4 July 2016, para. 23.

¹⁹⁴ *Ibid*, para. 116.

¹⁹⁵ *Supra*, note 28.

5.2.5 *Aid limited to a minimum*

State aid will be considered limited to the minimum when the beneficiary makes a significant contribution to the restructuring plan from its own resources. The Rescue and Restructuring Guidelines stipulate that for ‘large firms’, like Valencia CF, a contribution of at least 50% of the restructuring costs would be considered appropriate.¹⁹⁶ The total restructuring costs were believed to be €92.4 million (i.e. the amount obtained in 2009 through the sales of the club’s shares), but, as is described in Sect. 2.2, club shareholders only subscribed €18.8 million in these shares. The Commission noted that €18.8 million equals 20% of the restructuring costs, an amount well below the recommended 50%.¹⁹⁷

5.2.6 *The “one time, last time” principle*

By way of reminder, the IVF guaranteed two bank loans for Valencia CF. The first guarantee was granted in November 2009, while the second guarantee was granted November 2010 because the club had defaulted on its interest payment regarding the first bank loan. Due to the fact that the second guarantee had an *ad hoc* character and did not form part of the original restructuring plan in any way, the Commission considered this guarantee to be a completely new aid measure. As a consequence, the “one time, last time” principle was not complied with by the Spanish public authorities.¹⁹⁸

5.2.7 *The recovery order*

On the basis of the above, the Commission concluded that the measure did not meet the conditions required by the Rescue and Restructuring Guidelines, and declared the State guarantees incompatible with the internal market. As a consequence of this decision, and in order to re-establish the situation that existed on the market prior to the granted State guarantee, the Commission ordered Spain to recover from Valencia CF the State aid.¹⁹⁹ On the basis of the Commission’s calculations, the amount to be recovered totalled €20.381 million for both State guarantees.²⁰⁰

¹⁹⁶ The 2004 Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 44.

¹⁹⁷ Commission Decision SA.36387 of 4 July 2016, para. 121.

¹⁹⁸ *Ibid*, para. 124.

¹⁹⁹ *Ibid*, paras. 126–128.

²⁰⁰ *Ibid*, para. 93.

6 Conclusion: bailing out your local club safely

Notwithstanding the 2009 Viability Plan or the acquisition of the shares in October 2014 by *Meriton Holdings Limited* for €100 million, Valencia CF is still experiencing difficult times, both on and off the pitch. According to UEFA’s latest Benchmarking Report (released in January 2017), at the end of the financial year 2015 Valencia CF had a net debt of €285 million, an amount which is 3.5 times larger than its revenue for that same year.²⁰¹ Moreover, after ending only 12th in the league at the end of the 2015/16, the club failed to qualify for European club competitions. The 2016/17 season is so far proving to be a struggle against relegation to the second division, with only 12 points won during the first 15 league games. Not qualifying for European competitions greatly reduced its (yearly) income, and the club only managed to meet the Financial Fair Play Requirements by means of a €100 million loan from its majority shareholder, *Meriton*.²⁰² The club president admitted that the Commission’s recovery of more than €20 million “is a third of our income. If we are forced to pay it would be lethal regarding our possibilities on the transfer market this winter”.²⁰³

Valencia CF’s decision to bring an action against the Commission’s decision in front of the General Court of the EU can therefore hardly come as a surprise, and it is worthwhile to briefly highlight its first (and most interesting) claim. The club continues to maintain that it was not in financial difficulty at the time the State guarantee was granted and that, as such, it had not obtained an economic advantage in the sense of Article 107(1) TFEU. The Commission would have erred in its assessment of Valencia CF’s financial situation. Indeed, by basing itself on the book value of the players rather than on their real market value, arguably the Commission did not take into account “the specific business model of football clubs”.²⁰⁴ Whether or not the General Court will actually delve into the question of how players’ market value is to be determined remains to be

²⁰¹ UEFA Club Licensing Benchmarking Report Financial Year ending 2015, slide 126. http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/42/27/91/2422791_DOWNLOAD.pdf. Accessed 24 February 2017.

²⁰² Discurso de la Presidenta, Layhoon Chan, en el inicio de la Junta General Ordinaria de accionistas del Valencia CF S.A.D, page 1. 4 November 2016. <http://www.valenciacf.com/bd/archivos/archivo4148.pdf?nocache=0.664214>. Accessed 22 December 2016.

²⁰³ David Torres, “Si pagamos a Bruselas sería letal para el mercado de fichajes”. El Desmarque, 25 October 2016. <http://valencia.eldesmarque.com/valencia-cf/noticias/18351-si-pagamos-a-bruselas-seria-letal-para-el-mercado-de-fichajes>. Accessed 22 December 2016.

²⁰⁴ Action brought on 20 October 2016 in Case T-732/16, *Valencia Club de Fútbol v Commission*.

seen.²⁰⁵ Furthermore, even if the General Court were to rule that Valencia CF was not in financial difficulty in 2009 and 2010 (i.e. at the time the aid was granted), this would not automatically mean that no State aid was granted. As was explained in Sect. 3.2, not being in financial difficulty is only one criterion that needs to be complied with in order for the measure not to be considered State aid under the 2008 Guarantee Notice.²⁰⁶ Valencia CF will still have to demonstrate to the General Court that the State Guarantee was granted in line with the other criteria of the Guarantee Notice.

In any case, based on the State aid decisions discussed in this article, it is nonetheless worth analysing to what extent elements specific to professional football and its clubs were taken into account by the Commission in its assessments.

6.1 The Rescue and Restructuring criteria and professional football

The (current) decisional practice shows that the Commission takes due account of specific football features when assessing the proposed or implemented *compensatory measures*. The choice for this strategy was already stipulated in its Joint Statement with UEFA from March 2012, but at that moment the Commission was still in the process of determining what compensatory measures were to be considered adequate.²⁰⁷ The opening decision involving the Dutch football clubs provided more information regarding the direction the Commission would be taking. In this decision, the Commission suggested a set of compensatory measures that are directly related to professional football.²⁰⁸ These proposed measures were: (1) limiting the club's number of registered players for a season or several seasons; (2) accepting a cap on the relation between salaries and turnover; (3) banning the payment of transfer fees

for a certain period; and (4) offering additional expenditure on “pro bono” activities to the benefit of the community and training of amateurs.²⁰⁹

In the *Willem II* case, the Commission referred to the UEFA Club Licensing and Financial Fair Play Regulations²¹⁰ as well as national (KNVB) licensing rules when assessing the compensatory measures taken by Willem II. It endorsed the decision taken by the club not to make transfer payments during the restructuring period, since this prevents the club from spending money it might not have, as well as the reduction of the number of registered players from 31 to 27. A second reference to UEFA's FFP rules (though this time indirect) was made in the *NEC* case, when the Commission interpreted the cost reduction of wages below 60% of the turnover level as an acceptable compensatory measure.²¹¹

Nevertheless, in the *Valencia CF* case, the mere selling of the club's most valuable football players was not considered an adequate compensatory measure, but rather a necessary restructuring measure. The fact that the selling of a club's best players should be interpreted as a restructuring measure instead of a compensatory measure might be debatable. Yet, it is true that there are a number of striking differences between the *Valencia* case and the Dutch cases. For example, unlike in the Dutch cases, there is no reference made to the FFP Regulations or any other specific footballing rule. Nonetheless, the real important difference lies in the nature of the compensatory measures. Where the Dutch clubs abstained from paying sums for players on the transfer market, Valencia CF continued to do so, spending €61.85 million.²¹² Moreover, it is unclear from the *Valencia* decision whether the club reduced the number of registered players, nor whether it reduced the costs of wages/turnover percentage below the 70% required by UEFA, like Willem II and NEC had done. At this stage, it is therefore safe to conclude that merely selling players will not be considered an adequate compensatory measure by the Commission without additional actions that make the club less competitive *vis-à-vis* its (footballing) competitors. Be that as it may, a public statement by the Commission, perhaps together with UEFA like in March 2012, which includes a non-exclusive list of possible compensatory measure to be implemented by football clubs in financial difficulty that are recipient of State aid, could be useful in order to enhance legal certainty.

²⁰⁵ A CJEU assessment of how the market value of a player should be calculated could potentially trigger a complex set of questions. For example, thanks to the website *footballleaks* it became publicly known that Valencia CF sold part of the economic rights of at least one player (i.e. Dorlan Pabón) to a third party (Doyen), while the player was still registered at the club. See <https://footballleaks2015.wordpress.com/2015/12/01/valencia-cf-doyen-sports-dorlan-pabon/>. Accessed 22 December 2016. In other words, how would actively participating in Third Party Ownership-practices affect the financial status of a football club?

²⁰⁶ Commission Notice on State aid in the form of guarantees, point 3.2. (a).

²⁰⁷ By way of reminder, point 13 of the Joint Statement stipulated that “one of the key factors that the Commission takes into account is whether and how the undertaking in question implements compensatory measures in the interest of fair competition. Given the specificity of the sports sector, it is not always straightforward to envisage such type of potential compensatory measures for football clubs”.

²⁰⁸ SA.33584, para. 80. See also SA.40168, para. 50.

²⁰⁹ SA.33584, para. 80.

²¹⁰ In paragraph 51 of SA.40168, the Commission referred to UEFA Club Licensing and Financial Fair Play Regulations, Edition 2015, Article 62(4), which holds that the cost of salaries should not exceed 70% of total revenue.

²¹¹ SA.41617, para. 82.

²¹² *Supra*, note 192.

6.2 Large football clubs versus small and medium-sized football clubs: unfair competition?

A point that needs to be addressed is the difference in criteria under the 2004 Rescue and Restructuring Guidelines for small, medium-sized and large enterprises. As is explained above, restructuring plans for SMEs do not need to be endorsed by the Commission, while small enterprises are furthermore not required to implement compensatory measures.

It is understandable that SMEs were given more flexible criteria, since State aid measures granted to them are far more likely to be less distortive, and since SMEs, as the Commission has held, “face greater challenges than large undertakings in terms of access to liquidity”.²¹³ Yet, the professional football sector allows for small, medium-sized and large football clubs to compete directly with each other within one national league. Take the Dutch highest football league (Eredivisie) in the 2011/12 Season (the year in which NEC received State aid) for example. Ajax, the club that won that year’s league, had a turnover of €97.1 million and is thus considered a large enterprise.²¹⁴ NEC, with a fluctuating number of 60–70 employees between 2010 and 2015, was a medium-sized enterprise.²¹⁵ Finally, VVV-Venlo ‘only’ recorded a turnover of €7.794.058 for the 2011/12 season.²¹⁶ With this figure being less than €10 million, and given that VVV-Venlo had most likely less than 50 employees, this club should be regarded as a small enterprise. Subsequently, one could question the fairness of this discrepancy when considering that three clubs that directly compete with each other in the same (national) footballing competition, have three different procedures applicable to them should they need to receive State aid under the Rescue and Restructuring Guidelines. Nonetheless, as will be explained below in Sect. 6.3, part of this discrepancy has seized to exist following the latest changes adopted in the 2014 Rescue and Restructuring Guidelines.

²¹³ Communication from the Commission of 31 July 2014 (2014/C 249/01) Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, point 13.

²¹⁴ Ajax boekt winst en recordomzet. Ajax, 11 October 2011. <http://www.ajax.nl/streams/ajax-actueel/ajax-boekt-winst-en-recordomzet.htm>. Accessed 9 January 2017.

²¹⁵ SA.41617, para. 7.

²¹⁶ VVV-Venlo Jaarrapport 2011/2012, page 7. http://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjgtvr8jrXRAhUoD8AKHfJeCZcQFggaMAA&url=http%3A%2F%2Fwww.vvv-venlo.nl%2Fassets%2Fdocument%2FJaarverslag%2520VVVenlo%25202011-2012%2520voor%2520website1.docx&usq=AFQjCNFTwZ7cHMKO_zS1cUqIf3pFlfmdQ&sig2=Mbid-0yMy2XdLFWwNjMoig&bvm=bv.142059868,d.ZGg. Accessed 9 January 2017.

6.3 The 2014 Rescue and Restructuring Guidelines: a game changer?

In 2014 the Commission introduced its fourth Rescue and Restructuring Guidelines, following its earlier editions of 1994, 1999 and 2004. Although the 2014 Guidelines are substantially different in several aspects, this section will only briefly discuss the most important changes in the Guidelines, especially as regards potential future cases in the professional football sector.²¹⁷

6.3.1 Notion of undertaking in difficulty

The first important development related to the notion of ‘undertaking in difficulty’. In these Guidelines, the Commission attempted to significantly simplify this notion, “by removing any subjective elements and putting in their place new, objective criteria”.²¹⁸ According to these (exhaustive) criteria, an undertaking is considered to be in difficulty if at least one of the following circumstances occurs:

- In the case of a limited liability company, where more than half of its subscribed share capital has disappeared as a result of accumulated losses;
- In the case of a company where at least some members have a unlimited liability for the debt of the company, where more than half its capital as shown in the company accounts has disappeared as a result of accumulated losses;
- Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors;
- In the case of an undertaking that is not an SME, where, for the past two years, the undertaking’s book debt to equity ratio has been greater than 7.5 and its earnings before interest, taxes, depreciation, and amortization interest coverage ratio has been below 1.0.²¹⁹

Consequently, when an undertaking does not fulfil at least one of these criteria, it will not be allowed to receive State aid under the Rescue and Restructuring guidelines. However, the Commission does provide an ‘escape route’ in point 29 of the 2014 Guidelines by allowing rescue aid to undertakings that are not in difficulty (in accordance with the above criteria) but that are facing acute liquidity

²¹⁷ For a more elaborate discussion on the changes made in the 2014 Rescue and Restructuring Guidelines, see for example Petzold (2014).

²¹⁸ Commission Memo of 9 July 2014, MEMO/14/473 State aid: Commission adopts revised guidelines for supporting firms in difficulty – frequently asked questions, page 2.

²¹⁹ Communication from the Commission of 31 July 2014 (2014/C 249/01) Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, point 20.

needs due to exceptional and unforeseen circumstances. By way of reminder, the Commission has exclusive competence (subject to control by the EU Courts) to determine whether or not certain aid merits derogation from the general prohibition of Article 107(1),²²⁰ and consequently whether or not an aid measure fulfils the conditions of the 2014 Rescue and Restructuring Guidelines.

6.3.2 The compatibility with the internal market criteria

In addition to demonstrating that a firm is in financial difficulty²²¹ (or that there are exceptional and unforeseen circumstances), the Member State wishing to grant the aid will also have to comply with conditions that allow an aid measure to be compatible with the internal market. These conditions are listed as follows:

1. Contribution to an objective of common interest;
2. Need for State intervention;
3. Appropriateness of the aid measure;
4. Incentive effect;
5. Proportionality of the aid;
6. Avoidance of undue negative effects on competition and trade between Member States;
7. Transparency of the aid.²²²

In order to show that a restructuring measure contributes to an objective of common interest, a Member State will have to, *inter alia*, submit a restructuring plan to restore the beneficiary's long-term viability.²²³ Even though *a prima facie* this condition does not seem to differentiate so much from the 2004 guidelines,²²⁴ it should be noted that now all restructuring plans must be endorsed by the Commission in all cases of ad hoc aid.²²⁵ In other words, where the 2004 Guidelines only stipulated endorsement by the Commission for restructuring plans to 'large enterprises',²²⁶ the 2014 Guidelines require all restructuring plans to be endorsed, irrespective of the size of the undertaking.

Points 60 to 69 of the 2014 Guidelines lay down the conditions under which a rescue and/or restructuring measure will be considered proportionate to the objectives pursued. Unlike in the old Guidelines, where small undertakings were expected to contribute at least 25% to

the restructuring plan, medium-sized undertakings 40% and large undertakings 50%,²²⁷ the Commission now considers an own contribution adequate if it amounts to at least 50% of the restructuring costs for all beneficiaries.²²⁸ Consequently, the Commission has again harmonized the criterion applicable to small, medium-sized and large undertakings.

A new condition, the so-called burden sharing, aims at making an aid measure proportionate to the objectives pursued. The Commission believes that it is reasonable to expect investors in a troubled company - particularly shareholders, who receive the highest returns when the company performs well - to bear a fair share of the cost of restructuring.²²⁹ Therefore, State intervention should only take place after losses have been fully accounted for and attributed to the existing shareholders and subordinated debt holders.²³⁰ In line with this, gains must also be shared fairly. Therefore, an undertaking rescued and/or restructured through State aid must return a reasonable share of the profits to the State, once it performs well.²³¹

The Commission has replaced the term 'compensatory measures' in the 2014 Guidelines with a series of measures that must be taken to limit distortion of competition. These measures include structural measures, behavioural measures and market opening measures.²³² Even though the terminology in the new Guidelines is different, the general idea remains the same as in the old Guidelines: the measures should take place in particular in the market where the beneficiary undertaking will have a significant position after restructuring and have as objective to divest assets or reduce capacity or market presence.²³³ The extent of such measures will depend on factors, such as the size, nature, circumstances and conditions of the aid; size of the receiving undertaking; and the relative importance of the beneficiary in the market and the characteristics of the market concerned,²³⁴ thereby leaving considerable room for the Commission to decide on the appropriateness of the measures.

²²⁷ *Ibid*, points 43–44.

²²⁸ The 2014 Guidelines on State Aid for Rescuing and Restructuring non-financial undertakings in difficulty, point 64.

²²⁹ Commission Memo of 9 July 2014, MEMO/14/473 State aid: Commission adopts revised guidelines for supporting firms in difficulty – frequently asked questions, page 4.

²³⁰ The 2014 Guidelines on State Aid for Rescuing and Restructuring non-financial undertakings in difficulty, point 66.

²³¹ *Ibid*, point 67. See also Commission Memo of 9 July 2014, MEMO/14/473, page 4.

²³² The 2014 Guidelines on State Aid for Rescuing and Restructuring non-financial undertakings in difficulty, points 76–86.

²³³ *Ibid*, point 78.

²³⁴ *Ibid*, point 87.

²²⁰ *Supra*, note 113.

²²¹ The 2014 Guidelines on State Aid for Rescuing and Restructuring non-financial undertakings in difficulty, point 19.

²²² *Ibid*, point 38.

²²³ *Ibid*, point 45.

²²⁴ See Sect. 4.1.2.

²²⁵ The 2014 Guidelines on State Aid for Rescuing and Restructuring non-financial undertakings in difficulty, point 46.

²²⁶ The 2004 Guidelines on State Aid for Rescuing and Restructuring firms in difficulty, point 34.

Last but not least, with the objective of fulfilling the ‘transparency-criterion’, Member States are required to publish the full text of each individual aid granting decision and its implementing provisions on a comprehensive State aid website, at national or regional level.²³⁵ This last requirement is good news for academics, lawyers and other stakeholders to scrutinize if and under what conditions future rescue and/or restructuring aid is granted to professional football clubs, and if the Commission is consistent in deciding the compatibility of those measures.

6.4 Bailing out your local football clubs: lessons (not) learned

Barring the remaining uncertainties regarding adequate compensatory measures (or measures to limit distortion of competition under the 2014 Guidelines), the real problem is the apparent lack of awareness of the State aid rules and procedures in professional football clubs and local public authorities. The fact that none of the rescue measures, while clearly containing State aid elements, were notified either shows that the concerned parties believed that they were not ‘going to get caught’, or they simply were not aware of the existence of the State aid rules and procedures. Notification of a rescue operation does not automatically mean that the measure will be declared compatible,²³⁶ but it will increase the chances of a positive outcome. During the preliminary investigation, triggered by a notification, the Commission may engage in a dialogue with the Member State concerned, the recipient and other interested parties, in an endeavour to remedy the aspects of the measure which could be problematic under State aid rules.²³⁷ Consequently, prior notification would speed up the process, because formal investigations are more likely to be avoided. It should be recalled that the ‘Dutch’ and ‘Spanish’ formal investigations took roughly 40 and 31 months, respectively, a period in which the concerned clubs were faced with the uncertainty of whether or not the aid had to be returned.

The next lesson to be learned from these cases is to collaborate with the Commission, even after a formal investigation has been launched. As has now become apparent from press articles since the final decision was announced, public authorities in Valencia have in the past

failed to respond to documentation requests made by the Commission and simply left the matter “to rot in a drawer”.²³⁸ It is unclear whether this failure by the Valencian authorities proved fundamental for the final outcome of the decision, but it probably did not improve the club’s chances of getting off the hook.

Interestingly enough, very little is known regarding notifications of State aid granted to professional football clubs in financial difficulty since the ‘Dutch’ and ‘Spanish’ decisions, even though Member States are required to make authorized rescue operations publicly available.²³⁹ The lack of known rescue aid measures, however, has probably little to do with the lack of rescue operations. As was mentioned in Sect. 1 of this article, the Enschede city Council agreed on 16 February 2017 to guarantee a loan of €8.4 million granted to the Dutch club FC Twente in order to secure an earlier loan granted by the municipality to the club of €17 million.²⁴⁰ A document published on the municipality’s website further stipulates that “merely maintaining the (...) loan of €17 million” equals a possibility of bankruptcy of 100%.²⁴¹ Given that FC Twente was (and still is) clearly an undertaking in financial difficulty, such a State guarantee must be notified to the Commission. At this stage it is very much unclear whether the measure was notified, or not.

Moreover, as recent media articles show, even Valencia CF itself could well need State intervention in the (near) future in order to survive as a football club.²⁴² Should such a situation materialize, and given that the Commission’s approach for the assessment of State aid to professional football clubs in financial difficulty is now out in the open, public authorities and football clubs alike should use this information to their own advantage. As long as the criteria of the Rescue and Restructuring Guidelines are complied with, starting with the obligation to notify, there should be few reasons to fear negative Commission decisions.

Open Access This article is distributed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted use, distribution, and reproduction in any medium, provided you give appropriate credit to the original author(s) and the source, provide a

²³⁵ *Ibid*, point 96.

²³⁶ As can be seen from, for example, the *Zeuro* decision, notified aid measures can still be declared incompatible with the internal market by the Commission, with a recovery decision as a result. Commission Decision of 21 December 2000 (2002/779/EC) on the State aid granted by the Federal Republic of Germany to Zeuro Möbelwerk GmbH, Thuringia.

²³⁷ Quigley (2015), page 522. See also e.g. T-57/11, *Castelnou Energía v Commission*, ECLI:EU:T:2014:1021, para. 76.

²³⁸ La Generalitat pide a la Comisión Europea la suspensión cautelar del pago de la multa del Valencia CF. Europa Press, 4 November 2016. <http://www.europapress.es/comunitat-valenciana/noticia-generalitat-pide-comision-europea-suspension-cautelar-pago-multa-valencia-cf-20161104134535.html>. Accessed 9 January 2017.

²³⁹ The 2014 Guidelines on State Aid for Rescuing and Restructuring non-financial undertakings in difficulty, point 96.

²⁴⁰ *Supra*, note 18.

²⁴¹ Overzicht vergelijking effecten scenario’s (versie: 1). <http://www.raad053.nl/stukken/8756/1/>. Accessed on 21 February 2017.

²⁴² *Supra*, note 203.

link to the Creative Commons license, and indicate if changes were made.

References

- Caroline B, Jean-François R, Valentijn B (2016) Evaluating restructuring aid: a case study approach. *Eur State Aid Law Quart* 15:338–356
- Craven R (2014a) State aid and sport: football clubs in difficulty. *Eur Competit Law Rev* 35(12):581–587
- Craven R (2014b) Football and State aid: too important to fail? *Int Sports Law J* 3–4:205–217
- Petzold HA (2014) Rescue and restructuring (R&R) guidelines: thoughts and comments on the commission's draft. *Eur State Aid Law Quart* 13:289–294
- Quigley C (2015) *European State Aid law and policy*. Hart Publishing
- Serby T (2016) The state of EU sports law: lessons from UEFA's 'Financial Fair Play' regulations. *Int Sports Law J* 16(1–2):37–51
- Sloccock B (2002) The Market Economy Investor Principle. *Competition Policy Newsletter*, number 2, June 2002
- Slot PJ (2012) Rescue and Restructuring Aid. In: Hancher L, Ottervanger T, Slot PJ (2012) *EU State Aids*. Sweet & Maxwell, pp 913–942
- Valle E, Van de Castele K (2004) Revision of the rescue and restructuring guidelines: a crackdown? *European State Aid Law Quart* 3:9–15
- van Maren Oskar (2015) The Real Madrid case: a State aid case (un)like any other? *Compet Law Rev* 11(1):81–106
- van Maren O (2016) EU state aid law and professional football: a threat or a blessing? *Eur State Aid Law Quart*, 15:31–46
- Van Rompuy B, van Maren O (2016) EU control of state aid to professional sport: why now? In: *The Legacy of Bosman. Revisiting the relationship between EU law and sport*. T.M.C. Asser Press